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No. 97-1374

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. CLINTON, *et al.*,

Appellants,

vs.

CITY OF NEW YORK, *et al.*,

Appellees.

ROBERT E. RUBIN,

Appellant,

vs.

SNAKE RIVER POTATO GROWERS, INC., *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF FOR APPELLEES CITY OF NEW YORK, *et al.*

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Pursuant to this Court's Rule 25.5, appellees City of New York, *et al.*, respectfully submit this Supplemental Brief responding to an argument made by the Solicitor General for the first time in his Reply Brief on the merits. Appellants have claimed that appellees' invocation of jurisdiction under 28 U.S.C. § 1331 in the district court failed because that statute "does not create a cause of action, much less authorize adjudication of a suit against the government absent an independent waiver of sovereign immunity." Reply Brief for the Appellants ("Reply Br.") at 3 n.1. Appellants failed to raise these arguments below, in their Jurisdictional Statement to this Court, or in their opening brief on the merits.

STATEMENT

1. Throughout the course of this litigation, appellants have argued that appellees fail to satisfy the standing requirements of Article III, claiming that appellees have not demonstrated an actual or imminent injury sufficient to confer standing. The district court fully considered and rejected appellants' Article III standing arguments, *see* J.S. App. 11a-21a, and the issue has been fully briefed in this Court in the parties' merits briefs.

2. In appellants' opening merits brief, the Government argued for the first time that most of the appellees lacked *statutory* standing because the Line Item Veto Act, 2 U.S.C. § 692(a)(1), limited its grant of jurisdiction to actions brought by "individual[s]," which the Government says includes only " 'single human being[s].' " Brief for the Appellants at 16-17. In our own brief on the merits, we responded to this new claim by demonstrating that appellants' interpretation of the term "individual" was flawed. *See* Brief for Appellees City of New York, *et al.*, at 10-11. As we also pointed out, even if appellants' statutory construction were correct, thereby depriving the district court of jurisdiction over the claims brought by the non-natural person plaintiffs pursuant to § 692(a)(1), appellees had also

invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331. *See also* J.A. 22 (City of New York complaint); *id.* at 12 (Snake River complaint).

3. Recognizing that federal question jurisdiction plainly exists in this case — our claims unquestionably "arise under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331 — appellants once again shifted their line of attack, arguing for the first time in their reply brief that the district court's judgment should be reversed because 28 U.S.C. § 1331 (i) does not independently waive appellants' sovereign immunity, and (ii) does not "create a cause of action" other than that created by the Line Item Veto Act for "individual[s]." Reply Br. at 3 n.1. In other words, appellants have conceded that the district court had a basis for jurisdiction wholly apart from the jurisdictional grant set forth in the Line Item Veto Act. Nevertheless, they now argue that appellees have failed to overcome the previously unasserted affirmative defense of sovereign immunity, and have failed to identify "the source of substantive law upon which the claimant relies [to] provide[] an avenue for relief." *FDIC v. Meyer*, 510 U.S. 471, 484 (1994).

ARGUMENT

I.

APPELLANTS' NEW ARGUMENT CONCERNING APPELLEES' CAUSE OF ACTION IS NOT PROPERLY BEFORE THE COURT AND IS, IN ANY EVENT, WITHOUT MERIT.

1. Appellants' challenge to appellees' cause of action at this stage of the proceedings violates this Court's Rules 18.3 and 14.1(a) in that it is not fairly included within either of the questions presented in the Jurisdictional Statement. The Solicitor General sought this Court's review on two questions:

> 1. Whether the appellees in this case have standing to challenge the constitutionality of the [Line Item Veto] Act.
>
> 2. Whether the Act violates Article I of the Constitution or principles of separation of powers.

Jurisdictional Statement at I.

While appellants' statutory standing argument (based on their construction of the term "individual") arguably falls within the scope of the first question (although the Jurisdictional Statement focused exclusively upon the issue whether appellees had alleged sufficiently concrete injuries to satisfy Article III standing requirements), appellants' new assertion simply does not relate to standing. Whether or not Congress has established a cause of action entitling appellees to seek the relief awarded by the court below (beyond that established in the Line Item Veto Act) has no bearing whatever on appellees' standing to challenge the constitutionality of the Act!

2. In seeking relief from the district court, appellees invoked not only the cause of action established in the Line Item Veto Act, but also the Declaratory Judgment Act, 28 U.S.C. § 2201. *See* J.A. 22 (City of New York complaint); *id.* at 12

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1. Likewise, whether or not appellants may interpose a sovereign immunity defense (assuming *arguendo* that the scope of the waiver of sovereign immunity set forth in the Line Item Veto Act is limited to actions brought by natural persons) is wholly unrelated to the issue of appellees' standing. We recognize, however, that sovereign immunity is by nature jurisdictional, *see FDIC v. Meyer*, 510 U.S. at 475, and that this Court will itself "notice the possible absence of jurisdiction because [the Court is] obligated to do so even when the issue is not raised by a party." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993).

(Snake River complaint).[2] This Court has previously considered suits seeking declaratory relief for allegedly unconstitutional actions taken by the President in the absence of any other statute authorizing the action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952) ("The District Court was asked to declare the orders of the President and the Secretary [seizing the steel industry] invalid and to issue preliminary and permanent injunctions restraining their enforcement."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 410 (1935) (actions seeking to enjoin enforcement of executive order and regulations promulgated by the Secretary of the Interior pursuant to statute claimed to be unconstitutional). Appellants seek to divert attention from this point by arguing that review is unavailable under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, because there has been no "final agency action." Reply Br. at 3 n.1. The Government is correct, but only because it is settled that the President is not an "agency" whose actions are subject to APA review. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). But the Court in *Franklin* very carefully noted that "the President's actions may still be reviewed for constitutionality," *id.* at 801 (citing *Youngstown* and *Ryan*), notwithstanding the absence of APA review. *See also Dalton v. Specter*, 511 U.S. 462, 473 & n.5 (1994).

2. It is settled that the Declaratory Judgment Act establishes a cause of action by providing for "relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672-73 (1950).

II.

SOVEREIGN IMMUNITY DOES NOT SHIELD EXECUTIVE OFFICERS FROM SUITS ALLEGING THEY ACTED UNCONSTITUTIONALLY.

This Court has repeatedly made clear that "sovereign immunity would not shield an executive officer from suit if the officer acted either 'unconstitutionally *or* beyond his statutory powers.' " *Dalton*, 511 U.S. at 472 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949)) (emphasis added by *Dalton* Court). As the Court explained in *Larson*:

> There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. . . . A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional. Actions for habeas corpus against a warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here, too, the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. The only difference [from a case in which the officer lacks even a colorable claim of authority] is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity.

337 U.S. at 689-90; *see also Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962); *Scranton v. Wheeler*, 179 U.S. 141, 152-53 (1900).[3]

3. As the Court has recognized at least as far back as 1912, this (Cont'd)

The case at bar precisely fits the description set forth in *Larson*: the power conferred by the Line Item Veto Act upon the President "to take action in the sovereign's name is claimed to be unconstitutional." 337 U.S. at 690. As the Court made clear in *Dalton*, this exception applies with full force in cases where the action at issue is taken by the President, rather than a lesser executive officer. 511 U.S. at 473 & n.5 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), as cases in which the constitutionality of action taken by the President was reviewed notwithstanding the doctrine of sovereign immunity).[4]

(Cont'd)
"principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments" in the context of the Court's Eleventh Amendment jurisprudence. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (citing, *inter alia*, *Ex Parte Young*, 209 U.S. 123, 159 (1908)).

4. In *Dalton*, the Court held that the President's actions were not reviewable because the sole claim in that case was that the President's actions exceeded his statutory authority, and the Court held that this alone did not, as the court below had held, create a claim that the presidential action was "*ipso facto* in violation of the Constitution." 511 U.S. at 463. It was in this context that the Court carefully distinguished *Larson*, *Youngstown*, and *Ryan* as cases in which sovereign immunity did not attach in light of "our specifying unconstitutional and ultra vires conduct as separate categories." *Id.* at 472. The Court went on to reject the claim that the President's action exceeded his statutory authority on the ground that the statute in question committed the matter to his discretion. *Id.* at 476-77.

CONCLUSION

For the foregoing reasons, and those stated in our brief on the merits, the judgment of the district court should be affirmed.

Respectfully submitted,

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